any other legal means which a father may adopt, to enforce the authority which the law for wise purposes has given to him over his minor children, and that regard for his wishes and counsel in the more important concerns of their lives after maturity, which the untrammelled testamentary power conferred by our law is calculated to secure.

I am of opinion that the condition is certain, and is a legal and valid condition, and makes void the bequests to John, and that the direction to the executors to dispose of the estate as if John were dead in testator's life gives to the three other children absolutely both the share of the fund bequeathed to John and his issue, and that part of testator's property outside of this fund, which by the law of succession would have gone to John but for this provision.

## ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF INDIANA.[1]

SUPREME COURT OF PENNSYLVANIA.[2]

SUPREME COURT OF NEW YORK.[3]

SUPREME JUDICIAL COURT OF VERMONT.[4]

### AMENDMENT.

*Presumption as to Time of making.*—Independently of any showing of the day on which an amendment of process is procured, it will be taken to have been on the last day of term: *Burns* v. *First National Bank of St. Albans*, 45 Vt.

### ASSUMPSIT. See *Husband and Wife.*

*Evidence of Promise—Joint Contract.*—Johnston, wishing to be appointed a sequestrator, employed Mackrell, a lawyer, to conduct the proceedings in the Common Pleas. The petition was signed by a number of others, some of whom spoke to Mackrell and urged him to press the proceeding. *Held*, that this was not evidence of a promise on the part of the others to pay: *Cook et al.* v. *Mackrell et al.*, 70 Pa.

Mackrell declared against seven on a joint contract; there was *no* evidence in relation to three. *Held*, that the action could not be maintained: *Id.*

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[1] From J. B. Black, Esq., Reporter; to appear in 36 Ind. Rep.

[2] From P. F. Smith, Esq., Reporter; to appear in 70 Pa. St. Rep.

[3] From Hon. O. L. Barbour; to appear in vol. 64 of his Reports.

[4] From J. W. Rowell, Esq., Reporter; to appear in 45 Vt. Rep.

BILLS AND NOTES. See *Township Trustee.*

*Payable to Partnership—Endorsement by any one of the Firm.*—When negotiable paper is rightly taken payable to a partnership, any member of the partnership has authority to bind the firm by endorsing it in the firm name to a *bonâ fide* purchaser for value in due course of business, even though, as between the partners, such paper was the sole property of the partner endorsing it, and the partners had agreed that no member should endorse paper to make the others liable: *Barrett* v. *Russell and Flint,* 45 Vt.

CONSTITUTIONAL LAW.

*Legislative Power.*—The power of the legislature is omnipotent, within constitutional limits. And the good of the greatest number is regarded by the legislature as its justification for the extraordinary use of its power: *The People* v. *The New York Gas-Light Company,* 64 Barb.

CONTRACT.

*Construction of.*—A contract provided for the purchase, by the plaintiffs, and the sale by the defendant, of 100 bales of cloves, at five cents per pound, to arrive; "deliverable sound and in good order." On examining the cloves, after their arrival, part of them proved to be sound, and a part not sound, or in good order. The plaintiffs offered to receive the whole invoice—the unsound as well as the sound—and pay therefor the contract price. The defendant delivered the sound cloves, but refused to deliver the unsound. The unsound cloves were proven to be worth only two and a half cents per pound. They were sold at auction, under the direction of the insurers, and realized three and one quarter cents per pound. *Held,* that the plaintiffs could not have been required to receive the damaged cloves; but that they might waive the objection that they were unsound, and the vendor must then deliver. That *sound* cloves were deliverable, *unsound* not deliverable: *Townsend et al.* v. *Shepard,* 64 Barb.

That this construction embraced the whole meaning of the words "deliverable sound and in good order;" that provision being for the benefit of the purchasers, and against the seller. But that it was not a warranty that the cloves should arrive sound and in good order; nor was it an agreement that the vendor would deliver 100 bales of cloves, "sound or in good order:" *Id.*

*Held, also,* that when the plaintiffs offered to receive the whole invoice, and pay therefor the price named in the contract, the defendant was bound to deliver; and his refusal subjected him to the payment of such damages as the plaintiffs sustained thereby: *Id.*

But that there was no proof of any damage sustained by the plaintiffs, by reason of the defendant's refusal to deliver the unsound portion of the cloves; the price for which they sold, although greater than the market value, being less than the plaintiffs were required to pay by the contract, and less than their offer: *Id.*

CRIMINAL LAW. See *Evidence; Jury.*

*Gas Companies—Liability to Indictment for Nuisance.*—When the legislature has authorized a corporation to manufacture gas, to be used for lighting streets and buildings in a city, and required that the act

giving such authority shall be favorably construed in all courts, for the purposes expressed therein; and the company has, in pursuance of such authority, proceeded to erect gas-works, and to make and distribute gas therefrom, it is not liable to indictment for creating a *nuisance*, by unwholesome smells, smokes and stenches, rendering the air corrupt, offensive, uncomfortable and unwholesome, in conducting its business; where it is conceded that the buildings and processes of the company are of the best, and that it has used due care and diligence in the business: *The People* v. *The New York Gas-Light Company*, 64 Barb.

Although it may be that private persons can maintain an action for damages, yet the *people* are barred by the act which the legislature has passed from making a public complaint, by indictment, for such a cause, while the corporation conducts its business with skill, science and care: *Id.*

*Defence of House—Man's House his Castle.*—The idea embraced in the expression that a man's house is his castle, is not that it is his property, and that, as such, he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office, or his barn. The sense in which the house has a peculiar immunity, is that it is sacred for the protection of his person and of his family. An assault on the house can be regarded as an assault on the person only in case the purpose of such assault be injury to the person of the occupant, or members of his family, and in order to accomplish this, the assailant attacks the castle in order to reach the inmate. In this view it is said and settled that, in such case, the inmate need not flee from his house in order to escape injury by the assailant, but he may meet him at the threshold, and prevent him from breaking in by any means rendered necessary by the exigency; and upon the same ground and reason that one may defend himself from peril of life, or great bodily harm, by means fatal to the assailant, if rendered necessary by the exigency of the assault: *State* v. *Patterson*, 45 Vt.

DAMAGES. See *Master and Servant.*

*Fine in a Criminal Suit for same Matter—Counsel Fees.*—The imposition of a fine in a criminal proceeding for assault and battery will not bar, or mitigate, the party's liability to exemplary damages in a civil suit for the same act: *Hoadley* v. *Watson*, 45 Vt.

Such damages are recoverable with the ordinary damages under the common allegation that the act declared for was done to the damage of the plaintiff: *Id.*

The expenses of the plaintiff for counsel fees and other trouble in the suit, not taxable costs, are not a proper element of exemplary damages: *Id.*

*Proximate Result of Defendant's Acts.*—As a general rule one is answerable for the consequences of his fault only so far as they are natural and proximate, and may therefore be foreseen by ordinary forecast: not for those arising from a conjunction of his fault with circumstances of an extraordinary nature: *Fairbanks* v. *Kerr*, 70 Pa.

A man mounted a pile of flagstones in a street to make a public speech; a crowd of hearers gathered about him, some of whom also got

on the stones and broke them: *Held*, it was not a legal conclusion that the speaker was liable for the breaking of the stone by the bystanders: *Id.*

It was a question for the jury, whether the defendant's making the speech in the street was the proximate or remote cause of the injury. Making a speech in a street is not *per se* a nuisance: *Id.*

*When liquidated.*—By an agreement in writing for the sale of land, it was stipulated that in case the vendor should fail or refuse to execute and deliver a proper deed of conveyance, at the time and in the manner agreed, provided the purchaser should be ready to perform the covenants on his part; or in case the purchaser should fail or refuse to pay, &c., on his part, provided the vendor should be ready to deliver such deed; then that the party so failing should pay to the other party, or his or their assigns, the sum of $5000; which was thereby declared, fixed and agreed upon as the liquidated amount of damages to be paid by the party so failing, for his or their non-performance. *Held*, that by this contract, the damages for a breach thereof were liquidated at $5000; and that upon the failure of the defendant to execute a proper deed of conveyance on the day specified, the plaintiff was entitled to recover that sum: *Leggett* v. *The Mutual Life Ins. Co. of New York*, 64 Barb.

DEBTOR AND CREDITOR. See *Partnership.*

*Assignment of Claim.*—A trust-mortgage was made to Caldwell to secure, amongst others, a debt of Hartupee, who owed a firm of which Caldwell was a partner. Hartupee gave an order on Caldwell in favor of Cuthbert; on presentation Caldwell refused to pay Cuthbert, saying he would pay Hartupee's debt to his firm from what he was entitled to under the mortgage. At the trial Caldwell's partner consented that the firm's claim might be set off to Hartupee's claim against Caldwell. *Held*, that the order was an equitable assignment to Cuthbert, and he might recover from Caldwell: *Caldwell* v. *Hartupee*, 70 Pa.

*Vacating Settlement for Fraud or Mistake.*—The mistake of one party, and the fraud of the other, is quite as good cause for vacating the settlement of a claim, as a mutual mistake: *Bloodgood, Adm'r., &c.*, v. *Sears*, 64 Barb.

Where a party having a claim against an estate, for services rendered, was induced to make a settlement of such claim, with the administrator, by an erroneous statement contained in the inventory of the estate, whereby a large portion of such estate was suppressed, and the administrator violated his duty in concealing the part of the estate so suppressed; *Held*, that this was a proper case for vacating the settlement: *Id.*

DECEIT. See *Limitations.*

DEED. See *Partnership.*

*Boundaries—Monuments and Abuttals govern Courses and Distances.*—A deed described one line of the land thereby conveyed as running "north 34 degrees west, on said M.'s line and C.'s north line, 45 rods and 16 links, to the bound begun at," which was the line in dispute. At the time of the execution of said deed, the land of M., who was the grantee in said deed, which was contiguous to the land conveyed thereby, and on the line of which the disputed line was described as running,

extended northerly only to a brook which intersected said last-mentioned line. On the opposite side of the brook, C.'s land was situated, extending several rods further north-easterly along the brook than the point where "said M.'s line" terminated at the brook, so that, if the disputed line should be continued in the same course across the brook to the place of beginning, said deed would include a portion of C.'s land lying south of and adjoining the land of the grantor conveyed by said deed. In order for the line in question to reach and run on C.'s north line, it would, at the point where it reached C.'s land at the brook, have to turn nearly at a right angle, and run north-easterly on his line a few rods, to the corner of his land, then turn at an acute angle, and run on his north line in a course, north 67½ degrees west. At the time of the execution of said deed, C.'s north line was marked by a log and slash fence on the land, and as nearly on the line as such fences usually are. *Held*, that the monuments and abuttals, and not the course, controlled the construction of said deed, and that the land thereby conveyed was bounded along the line in question by the said lands of M. and C.: *Bundy* v. *Morgan*, 45 Vt.

EJECTMENT. See *Vendor*.

EQUITY. See *Nuisance*.

*Relief—Damages—Restraint of Trespass.*—When a court of equity has jurisdiction, if the relief prayed for cannot be granted, compensation in damages may be awarded in lieu thereof: *Masson and Besanson's Appeal*, 70 Pa.

Parties agreed to erect a party-wall, each to build a portion specified; one refused and the other erected the whole wall; the former then commenced to use the party-wall for his building; the other brought a bill to restrain him; pending the dispute, they agreed that the defendant might go on with his building, giving bonds for such sum as might be adjudged to the plaintiff, and the injunction was therefore withheld. *Held*, That as the specific relief asked, therefore, could not be granted, the court, "both inherently and by virtue of the agreement," had power to ascertain and award compensation: *Id.*

The plaintiff having finished the wall under the agreement, it was his own until paid for, and the threatened act of defendant of breaking into the wall might be restrained: *Id.*

Equity will restrain a trespass of a permanent nature; an action for damages in such case not being an adequate remedy, as in case of a temporary trespass: *Id.*

EVIDENCE.

*Proof of Agreement—Written and Parol Evidence*—The rule, as to the admissibility of parol evidence to vary written agreements, does not touch the validity of the agreement sought to be proved, but only the kind of evidence by which the party may be compelled to prove it; and if the agreement is admitted on trial, or by the pleadings, or is proved without objection by parol evidence, it is a waiver of the rule, and becomes the agreement as fully operative as if it had been proved by a writing: *Davis* v. *Goodrich*, 45 Vt.

*Dying Declarations.*—It is not necessary in order to make dying

declarations admissible in evidence, that the declarant should state everything constituting the *res gestæ* of the subject of his statement, but only that his statement of any given fact should be a full expression of all that he intended to say as concerning his meaning as to such fact: *State* v. *Patterson*, 45 Vt.

*Illegal.*—The admission of illegal testimony, by a referee, will not warrant a reversal of the referee's decision, where there is sufficient evidence, without such testimony, to sustain the judgment; the error of the referee, if any, in admitting the illegal testimony, in such a case, not being injurious to the unsuccessful party: *Fabbri et al.* v. *The Mercantile Mutual Ins. Co.*, 64 Barb.

*As to Value.*—It is not necessary that a witness, in speaking of value, should only speak from actual observation. Where, from the destruction of property, no witness can be produced who has had an opportunity to examine and be conversant with the value, the rule which allows the next best evidence to be produced, applies; and the value may be ascertained from persons conversant with property of that nature, after they are made acquainted with its condition by the testimony of others: *Orr* v. *The Mayor, &c., of New York*, 64 Barb.

## Homestead.

Under the statutes of this state, the homestead of a debtor is exempt from attachment upon debts contracted after the filing of the deed thereof in the town clerk's office, and before the occupation of the premises by the debtor as a homestead, when he is in such occupancy at the time of the attachment: *Lamb* v. *Mason*, 45 Vt.

## Husband and Wife. See *Witness*.

*Married Woman—Revocation of Will by Marriage.*—The rule that the marriage of a woman revoked a will made by her before marriage, rested for its reason on the fact that, by virtue of the husband's marital rights, the woman, becoming *covert*, became thereby disabled to dispose of the property named in the will, the will ceased to be ambulatory: *Morton et al.* v. *Onion, Ex.* 45 Vt.

Hence, where a *feme sole* made a will, and married, and a considerable portion of the property disposed of by the will remained in her, unaffected upon her death by any marital rights of her surviving husband, it was *held*, that the will was entitled to be probated: *Id.*

*Wife may recover Money on her Contract to release Dower.*—A purchaser agreed to pay a wife $500 if she would execute a deed for land sold by her husband; she executed the deed. *Held*, that she could recover the money from the purchaser: *McAboy* v. *Johns*, 70 Pa.

The contract between the purchaser and the wife was that he was to give her a writing for the payment of the money. He gave her a paper which she could not read and represented that it contained the contract; she thereupon executed the deed. The paper did not contain the verbal agreement. *Held*, that she might recover on the verbal promise: *Id.*

## Infant.

*Guardian's Sale—Judgment—Sale on Execution.*—Where, upon the petition of his guardian, the court, on the 15th day of February 1868,

ordered the sale under a judgment of the land of a minor, and A. recovered a judgment against the minor on the 19th day of February 1868, and purchased the land at sheriff's sale on the 11th day of April following; and seventeen days later B. purchased the land from the guardian, paying one-half the purchase-money and securing the remainder in one year, and the court approved the sale at the May Term 1868. *Held*, that the title to the property was in A: *Shaffner, Adm'r*, v. *Briggs and Another*, 36 Ind.

*Held*, also, that the order for the sale of the land did not operate *in præsenti*, and convert the land into assets in the hands of the guardian so as to prevent the judgment from operating as a lien on the land; nor did the title of the purchaser at a guardian's sale relate back to the order of sale, so as to prevent any intervening liens or rights being acquired: *Id.*

The lands of an infant may be sold on execution against him: *Id.*

### Jury.

*Communication with after Retirement—Statutes.*—It is error for the court to have any communication with the jury after a case has been submitted to them, and while they have it under consideration, except in open court: *State* v. *Patterson*, 45 Vt.

It is also error for the court to furnish the jury a copy of the statutes of the state while they are out of court deliberating upon their verdict, that they may read certain provisions, designated by the court, touching the case under consideration: *Id.*

### Limitation, Statute of.

*Agent—Misrepresentation—Concealment.*—An action was brought in 1870 by A. against B., the complaint alleging that B. had, in the year 1848, falsely represented himself to A. as the agent of C., to whom A. was indebted on a promissory note, and as such agent had received from A. the money due C. and promised to pay the same to C. and take up and destroy the note; but that B. had retained the money himself, and A. had only discovered the fact about the time of the bringing of the suit; and B. in answer pleaded the Statute of Limitations, to which A. replied, that he paid the money to B. on his claim that he was the agent of C., and believing him to be such agent and authorized to receive the same, when in fact he was not such agent nor had such authority, but concealed such fact from A. and promised to pay the same over as such agent, which he failed to do, and by reason of such concealment A. did not discover the cause of action until in the fall of 1869. *Held*, that the reply was insufficient to avoid the statute; that the concealment was all previous to the accruing of the cause of action, and something more is required to avoid the statute than mere silence after the action accrues: *Stanley* v. *Stanton*, 36 Ind.

### Master and Servant.

*Liability of Master for wilful Acts of Servant—Conductor.*—A boy riding on a car was wilfully and wantonly struck by the driver, and thereby thrown off the car; the car-wheel passed over him: *Held*, in a suit against the car-owners; 1. That they were not liable for the act of the driver in striking the boy. 2. They were liable for negligently

driving over him: *P., A. and M. Passenger Railway Co.* v. *Donahue*, 70 Pa.

A master is liable for the results for the wilful conduct of his servant if within the scope of his authority: *Id.*

A blow may be given by a conductor or driver when by resistance to proper authority it becomes necessary: *Id.*

The court charged that the jury "would be justified in giving the plaintiff compensation, not only for such damages as he had already sustained, also such as will reasonably sustain in the future arising from the injury complained of, but also allow him for any pain and suffering he has sustained by the injury." *Held*, to be correct: *Id.*

That damages for negligence are to be measured by the same rule to artificial persons as to natural persons, should be held by courts and juries, and care should be taken by judges trying the causes that it be so administered: *Id.*

NEGLIGENCE. See *Master and Servant.*

NUISANCE.

*Brickburning—Restraint of lawful Business by Injunction.*—Brick-making being a useful and necessary business, and necessarily exercised near towns, the *burning* of bricks, an essential part of the business, is not a nuisance *per se*: *Huckenstine's Appeal*, 70 Pa.

Although an useful employment may produce discomfort or injury to those near to it, it does not follow that it should be restrained: *Id.*

The aid of a court of equity is not of right but of grace; to be extended only where its exercise is certainly just, wise and proper: *Id.*

In a question of restraining a lawful business, a court of equity will consider the customs of the people, the characteristics of their business, the common uses of property and the peculiar circumstances of the place: *Id.*

In this case an injunction against a brick-kiln as injuring a vineyard and residence was refused: *Id.*

PARTNERSHIP. See *Bills.*

*Deed—Treatment of Real Estate as held in Common or in Partnership.*—A deed to persons as tenants in common, who are partners, must, as to *purchasers* of the title and *creditors* having liens on it, stand as the foundation of their rights and govern in distributing the proceeds of a sale of the title: *Ebbert's Appeal*, 70 Pa.

As to creditors, the effect of such deed cannot be changed by parol evidence, and the land converted into partnership assets, so as to affect the liens of otherwise preferred creditors: *Id.*

As between the partners, a trust may result to the firm and the proceeds of the land be assets of the partnership, when they so treated the title and paid for it from partnership funds: *Id.*

Partners can direct the application of the firm funds, and secure their identity in the kind of title they take for them: *Id.*

If they take the title as tenants in common, they give character to the title as to those who afterwards deal with them: *Id.*

Upon a purchase by B. & M. from the plaintiffs of goods for a proposed new firm of B. & Co., B. & M. represented that B. was to be a member of said firm in about six weeks; whereupon the goods were sold

to B. & M., and the note of B. & Co. taken, for the amount. Such partnership was never in fact formed, but no notice of that fact was given to the plaintiffs, until after the delivery of the goods and the receipt of the note. *Held*, that these facts established a legal liability on the part of M. That although the agreement was that the partnership should not commence until a future day, and the agreement was never carried out, yet the purchase itself was a *quasi* partnership transaction; and it having been expressly sanctioned by M., that he was *estopped* from disputing his liability: *Stiles et al.* v. *Meyer*, *impleaded*, *&c.*, 64 Barb.

PLEADING.

*Arrest of Judgment—Estoppel.*—Where the error alleged is in arresting judgment, the Supreme Court will not look to the testimony for aid in pronouncing on the judgment of the court below: *Aronson* v. *Cl. and P. Railroad Co*, 70 Pa.

If the declaration be sound, the plaintiff is generally entitled to judgment: *Id.*

A declaration was against defendants for loss of goods as *carriers*: after verdict it was to be presumed that this was made out: *Id.*

In another action for the loss of the same goods against the defendants as *warehousemen*, the plaintiff would be estopped by his allegation that they were carriers: *Id.*

RAILROAD. See *Master and Servant.*

RECEIVER.

*Suit against Assignee—Statute.*—Action by a receiver against the assignee, under an assignment for the benefit of creditors, of a judgment-debtor, to recover damages resulting to a judgment-creditor for the failure of the assignee to properly discharge his duty under the trust. *Held*, that the action could only be sustained at the suit of the party injured, or his assigns: *La Follett* v. *Akin*, 36 Ind.

*Held*, also, that the 205th section of the code (2 G. & H. 153) only authorizes the court to empower the receiver to bring suit where the party whose effects he receives could have brought the action, save, perhaps, in exceptional cases: *Id.*

SALE. See *Vendor.*

*Conditional Sale—Rescission—Tender of Certificate.*—George sold stock to Braden, and agreed that he would take it back and return the price if requested, and delivered a certificate. *Held*, that Braden could recover the price without tendering the certificate; but that he must surrender the certificate to George or file it in court, before execution could issue: *George* v. *Braden*, 70 Pa.

TOWNSHIP TRUSTEE.

*Title to Money in his Hands*.—A township trustee is not a mere bailee of the money that comes into his hands by virtue of his office. He is liable to account for and pay it over, whether the same be stolen or burned without his fault or loaned out. The legal technical title to the money in his hands is in himself: *Rock and Another* v. *Stinger*, 36 Ind.

*Promissory Note.*—In an action upon a promissory note, an answer that the money forming the consideration for the note was township and

school money, coming into the hands of the plaintiff by virtue of his office as township trustee, and unlawfully loaned by him to the defendants, and that since said loan the plaintiff had vacated his office, constituted no defence to the suit: *Id.*

TRESPASS. See *Equity.*

TRUST.

*Resulting Trust—Mortgage—Merger.*—Where a third party pays the purchase-money to the grantor for the grantee of lands at the time of the conveyance, upon a parol agreement, without fraudulent intent, with the grantee, that the grantee shall hold the land in trust, as security for the payment of such money to such third party, a resulting trust arises in favor of such third party and against the assignee of a prior judgment who is the purchaser of said land at sheriff's sale on execution issued upon said judgment rendered prior to the said conveyance and payment of money, who has full knowledge of the said agreement and payment of money. But if, after said payment by said third party and the agreement between him and the grantee, said third party receives the note of the grantee, and a mortgage on said land, as security for the purchase-money so paid by said third party, he thereby converts the equitable estate he held in the land, not into an express trust, but into a mere debt secured by mortgage, and subject to the lien of the prior judgment: *Milliken and Others* v. *Ham*, 36 Ind.

A resulting or implied trust cannot be created or reserved by parol: *Id.*

A mortgage takes effect from the time of its delivery: *Id.*

VENDOR AND PURCHASER.

*Lease with Stipulation of Right to Purchase—Assignment of Lease.*—A lease contained a stipulation that the lessee at the end of the time might have a conveyance of the premises at a specified price; he assigned the lease; *held*, that the assignee was entitled to a conveyance: *Napier* v. *Darlington*, 70 Pa.

Such stipulation is not merely a personal covenant but a right, which may be transferred to his vendee, and enforced at his election, as if the contract had been absolute: *Id.*

The stipulation was a continuing offer to sell, and when accepted by the lessee, a contract of sale was completed: *Id.*

In an ejectment, the plaintiffs recovered a verdict to be released on the defendant paying into court the sum found as purchase-money of the *whole* tract, to be taken out by the plaintiffs on their filing a deed to the defendant of the premises. The defendant paid in the sum, and the plaintiffs filed a deed purporting to convey the whole tract. It being ascertained that the plaintiffs were the owners but of $\frac{2}{3}$, the defendant was allowed to take out $\frac{1}{3}$ of the money paid in, and the plaintiffs to file a deed conveying but $\frac{2}{3}$: *Id.*

*Warranty of Land—Opening of Highway not an Eviction.*—When land is sold with general warranty, the opening of a public highway in virtue of eminent domain, is not an eviction which will entitle the vendee to maintain an action for breach of the covenant: *Peck et al.* v. *Jones*, 70 Pa.

A defect or encumbrance not known to the vendee when he accepts

the deed, is a defence to a bond for purchase-money, although there be a general warranty: *Id.*

Knowledge or ignorance of an encumbrance, or of a defect not appearing on the face of the title, is immaterial: *Id.*

In an action on an agreement of sale, the vendee cannot defalk from the purchase-money on account of a public road upon land which the owner covenanted to sell and convey: *Id.*

*Title—Covenant to convey free from Encumbrances.*—The defendant, by a written contract, agreed to sell to the plaintiff, for $15,000, certain premises which it had purchased at a foreclosure sale; and that on a day named, upon receiving from the plaintiff $5000 and a bond and mortgage for the balance of the purchase-money, it would execute and deliver to him or his assigns, a proper deed of conveyance of the premises, "free from all encumbrances." On the day of performance, the plaintiff offered to perform on his part, and the defendant tendered a deed. But it appearing that prior to the foreclosure of the mortgage under which the defendant claimed to have acquired title, the mortgagor had died, leaving a will, by which he devised the mortgaged premises to certain of his children for life, with remainder to his grandchildren, and that such grandchildren were not made parties to the foreclosure suit, the plaintiff refused to accept a conveyance.

*Held*, 1. That the grandchildren of the mortgagor had an interest, as remaindermen, in every portion of his estate, capable of being ascertained whenever the prior estate should terminate.

2. That the trustees under the will did not, and could not, represent such future estate of the grandchildren, at the date of the foreclosure suit.

3. That although such interest might have been foreclosed, by making the grandchildren parties to the foreclosure suit, yet as they were not parties to the action, their right to assert their title, at the proper time, remained outstanding.

4. That the insolvency of the estate of the mortgagor did not affect the question.

5. That the title which the defendant contracted to convey was not free and clear of all encumbrance, and the plaintiff rightfully refused to accept the deed: *Leggett* v. *The Mutual Life Ins. Co. of New York*, 64 Barb.

WILL. See *Husband and Wife.*

WITNESS.

*Husband and Wife.*—At common law, where the husband was excluded as a witness on the ground of interest, the wife was also excluded. The statute has not changed the rule that husband and wife are incompent witnesses for or against each other. Where the husband is made a party to answer to an assignment by him of a cause of action to the plaintiff, and the assignment is not questioned, the wife may testify as to other matters; but where the husband has a pecuniary interest in the result of the action, she cannot be a witness: *Stanley* v. *Stanton*, 36 Ind.

Interest, or bias, although they may be taken into consideration in weighing the value of evidence, do not disqualify a witness: *Arend* v. *The Liverpool, New York, &c., Steamship Company*, 64 Barb.